IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, vs. RYAN EUGENE BERG, Appellant.	)	DIVISION ONE No. 57130-3-I **UNPUBLISHED OPINION** FILED: September 11, 2006

BAKER, J. — Ryan Berg appeals the revocation of his suspended sentence, arguing among other things that the sentence condition he allegedly violated was unconstitutionally vague. Because we conclude that Berg's judgment and sentence provided inadequate notice as to when the challenged condition took effect, we hold the condition was void for vagueness and reverse the order of revocation.

FACTS

Based on evidence that Berg digitally penetrated and had fellatio with a neighbor girl when she was 12 and 13 years old, the State charged him with two counts of second degree rape of a child. Berg stipulated to facts in the affidavit of probable cause and police reports in exchange for the opportunity to seek an evaluation supporting a Special Sex Offender Sentencing Alternative (SSOSA).

The court accepted the stipulation and convicted Berg on both counts.

The presentence investigation report (PSI) and SSOSA evaluation recited the following facts. At the time of trial, Berg had a 13-year-old stepson and a 7-year-old biological daughter. Berg had been sexually abused by his stepfather as a child and exposed himself to his younger sister when he was only 12 or 13. He recalled that his sister "played" with his penis.

At age 19, Berg had sex with several 15-year-old girls, had a relationship with a girl he thought was 16 but turned out to be 15, and was arrested for, but not charged with, indecent liberties involving a 13-year-old neighbor girl. The PSI recommended a SSOSA with several conditions, including a condition that Berg not initiate or prolong contact with minor children. The report cautioned that, due to his incestuous contacts with his stepfather and sister, Berg should not continue living with his minor daughter and stepson. The SSOSA evaluator, Dr. Michael O'Connell, also recommended a SSOSA and a condition prohibiting initiating or prolonging contact with minors. O'Connell was "willing to consider" Berg living with his family, but only with his wife's active participation in his treatment. Dr. O'Connell was concerned about Berg's stepson and daughter bringing teenage girls into the home.

The court imposed a SSOSA, suspending a sentence of 136 months. The suspension had several conditions, including six months of total confinement and a requirement that Berg not initiate or prolong contact with minor children "without the presence of an adult who is knowledgeable of the

offense and has been approved by the supervising Community Corrections Officer." The court expressed reservations about the SSOSA and repeatedly warned Berg that even a minor misstep would result in revocation.

Four days after sentencing, Berg's wife and children visited him in jail. The visit lasted 45 minutes before jail guards ended it because they were concerned that it was inappropriate.

The jail visit resulted in the SSOSA revocation hearing at issue in this appeal. The State argued at the hearing that Berg had violated the sentence condition prohibiting unapproved contact with minor children. Defense counsel argued that Berg did not willfully violate the condition because the judgment and sentence was ambiguous as to when the conditions of community custody took effect. Berg told the court that he thought the conditions did not take effect until he was released from confinement and community custody commenced.

Reading from a transcript of its statements to Berg at sentencing, the court stated it had made it clear at sentencing that Berg was not to have contact with minors unless the contact was approved by his CCO and counselor. The court ruled that Berg had violated the conditions of his suspended sentence, revoked the SSOSA, and imposed the suspended sentence. The court stated that Berg "had enough knowledge" to be aware that the jail visit violated the judgment and sentence.

DECISION

Berg contends his judgment and sentence was ambiguous as to when the

sentence condition prohibiting unapproved contact with minors took effect. He contends that the ambiguity deprived him of adequate notice and rendered the condition void for vagueness. We agree.[1]

A sentence condition is void for vagueness if ordinary people cannot understand what conduct is prohibited.[2] Absent first amendment concerns, which are not raised here, Berg can only challenge the vagueness of the condition as applied to his conduct.[3] In this case, an appendix attached to the judgment and sentence lists a number of "Conditions of Community Custody", including the following:

> Do not initiate or prolong contact with minor children without the presence of an adult who is knowledgeable of the offense and has been approved by the supervising Community Corrections Officer. The court specifically does not approve Mrs. Berg, defendant's wife, as a chaperone at this time. Court may reconsider.

While this condition of community custody is clear, when community custody begins is not.

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[1] The State argues that Berg cannot raise this argument for the first time on appeal. But Berg did argue below that the judgment and sentence was ambiguous as to when the conditions of community custody took effect. Furthermore, we have discretion to review issues for the first time on appeal, RAP 2.5(a), Pulcino v. Federal Express, 141 Wn.2d 629, 649, 9 P.3d 787 (2000) ("RAP 2.5(a) is permissive in nature and does not automatically preclude the introduction of an issue at the appellate level"), and while this is not a direct appeal from the challenged judgment and sentence, it is "well established that a party may raise for the first time on appeal a challenge to a sentence on the basis that it is contrary to law." State v. Armstrong, 91 Wn. App. 635, 638, 959 P.2d 1128 (1998). Under the circumstances, we exercise our discretion to review Berg's vagueness challenge for the first time on appeal.

[2] State v. Sansone, 127 Wn. App. 630, 638-41, 111 P.3d 1251 (2005).

[3] Sansone, 127 Wn. App. at 638.

Two paragraphs in the judgment and sentence address community custody. Paragraph 4.5(c) states in pertinent part:

> SUSPENSION OF SENTENCE. The execution of this sentence is suspended and the defendant is placed on community custody under the charge of the Department of Corrections for the length of the suspended sentence or three years, whichever is greater, and shall comply with all rules, regulations and requirements of the Department. The defendant shall report as directed to a community corrections officer . . . and be subject to the following terms and conditions . . . . (Emphasis added.)

The paragraph goes on to list several conditions of the suspended sentence, including six months of total confinement and the conditions in Appendix A.

Paragraph 4.10 also addresses community custody and states in pertinent part:

> COMMUNITY CUSTODY . . . For each count, the defendant is sentenced to community custody under the supervision of the Department of Corrections (DOC) and the authority of the Indeterminate Sentence Review Board for any period of time that the defendant is released from total confinement before expiration of the maximum sentence. (Emphasis added.)

Finally, Paragraph 4.6 states that the court may revoke a suspended sentence "at any time during the period of community supervision."

An ordinary person reading these provisions could easily be confused and/or mistaken as to when community custody and the conditions of community custody took effect. While lawyers familiar with criminal sentencing would discern from these provisions that two types of community custody are in play—one that begins immediately upon suspension of the sentence and one that begins upon termination or revocation of the suspended sentence and

release from confinement—an ordinary person would have great difficulty apprehending that distinction. The ambiguity in these provisions is not helped by the fact that, to a lay person, "community" custody would normally connote something that takes place once the defendant is in the community, not in confinement. In short, viewed from the standpoint of an ordinary person, the provisions in Berg's judgment and sentence provided inadequate notice and are unconstitutionally vague.

The remaining question is whether the provisions were vague as applied to Berg's conduct. At the time of his alleged violation, Berg was in jail serving the confinement portion of his suspended sentence. He had not been in the community or assigned a Community Corrections Officer. Nor had his suspended sentence been revoked. As applied to these circumstances, the provisions of Berg's sentence were unconstitutionally vague.

We disagree with the trial court's conclusion that Berg "had enough knowledge to be aware and to be wary" that the jail visit violated the judgment and sentence. The court based that conclusion on the following oral admonition to Berg at sentencing: "I'm going to prohibit your contact with minors, even your own children, unless approved by your counselor and the Department of Corrections." These remarks merely reiterated the terms of the condition; they did not clarify when community custody and its conditions commenced.[4]

[4] Given our disposition of the appeal, and in light of a recent order allowing telephone contact between Berg and his children, we need not address his contention that the original sentence condition prohibiting all contact was an

Accordingly, we reverse the order of revocation and remand for proceedings consistent with this opinion.

Baker, J.

WE CONCUR:

Schindler, ACJ Appelwick, C.J.

unconstitutional restriction on his right to parent.